



2003

Insert Coins to Slay - Regulating Children's Access to Violent Arcade Games

Elizabeth A. Previte

Follow this and additional works at: <https://digitalcommons.law.villanova.edu/mslj>



Part of the [Entertainment, Arts, and Sports Law Commons](#), and the [First Amendment Commons](#)

Recommended Citation

Elizabeth A. Previte, *Insert Coins to Slay - Regulating Children's Access to Violent Arcade Games*, 10 Jeffrey S. Moorad Sports L.J. 69 (2003).

Available at: <https://digitalcommons.law.villanova.edu/mslj/vol10/iss1/5>

This Casenote is brought to you for free and open access by Villanova University Charles Widger School of Law Digital Repository. It has been accepted for inclusion in Jeffrey S. Moorad Sports Law Journal by an authorized editor of Villanova University Charles Widger School of Law Digital Repository.

Casenote

INSERT COINS TO SLAY! REGULATING CHILDREN'S ACCESS TO VIOLENT ARCADE GAMES

I. INTRODUCTION

To complete the abysmal mission of the video game *Doom*, a player deposits a trail of disfigured corpses while single-handedly devising a mass bloodbath.¹ Ravenous demons compel the player to slay and dismember each living obstacle on the screen to achieve savage victory.² Reward for consummate carnage includes complimentary ammunition, allowing the player to load up and shower more bullets into “undead” flesh.³

In the video game *Quake II*, after one shot to the player's opponent, the player must refrain from celebrating for fear that the victim may still be alive.⁴ To relieve this apprehension, the player instinctively executes a prolonged blast at the victim's corpse until flies hover around the blood-soaked, decapitated cadaver.⁵ The player learns to plant explosives skillfully, lob grenades, and “use

1. See *Old School Doom – General Information*, at <http://www.doomcenter.com/oldschool/generalinfo.phtml> (last visited Oct. 12, 2002) (“You're a space marine armed with a mere pistol. Your mission is to locate more substantial firepower, blow your way through an onslaught of undead marines and mutant demons from hell, and navigate yourself off a radioactive moon base.”).

2. See *id.* (“In order to survive, not only do you have to make it through the first 27 blood-splattered levels of *Doom*, you also have to get through nine more incredibly tough expert levels in the all-new episode ‘Thy Flesh Consumed.’”).

3. See *id.* (using video game jargon to label enemy, “undead marines”). Players covet “cheats” or hidden codes that provide full armor and weapons, “God mode,” which triggers invincibility, the ability to walk through walls, teleportation, and more. See *Old School Doom – Cheats*, at <http://www.doomcenter.com/oldschool/cheats.phtml> (last visited Oct. 12, 2002).

4. See *The Quake II Bootcamp: Tactics: Fundamentals, Conserve Ammo*, at <http://www.planetquake.com/bootcamp/tactics/fundamental.shtm> (Mar. 9, 1998) (advising players to conserve ammunition by “control[ling] your impulse [to] shoot anything you see until it dies” and to “[o]nly shoot when you are sure it has at least a 75% chance of doing some damage”).

5. See James J. Holland, *Game Review: Quake II*, at <http://webarchive.org/web/20010622071509/www.pcgameworld.com/reviews/q/quake2/index.htm> (last visited Oct. 12, 2002) (depicting game's gory graphics). Players of the game are instructed as follows: “Shoot [the enemy] and watch the blood spots appear on [his] bod[y]. Decapitate [him] with a few well placed shots and watch the flies swarm around the rotting corpse. It's the attention to details like this that makes *Quake II* so enjoyable.” *Id.*

any automatic weapon to rip [the opponent] in half.”⁶ When the player becomes more adept, he or she can execute murder and mutilation with ease.⁷

In *Mortal Kombat*, one of the most skilled moves a player masters, if he or she is so auspicious, is called a “fatality.”⁸ A player performs this elite maneuver of complex button-pushing once prompted by a chilling voice that mercilessly bellows, “FINISH HIM,” and then induces his or her character to reach a bare hand into the opponent’s chest, rip out the still-beating heart, and heave it onto the ground as blood spews all over the screen.⁹

Released in 2001, *Grand Theft Auto III* is a recent addition to the world of violent video games.¹⁰ In this game, a player slays an

6. *The Quake II Bootcamp: Tactics: Advanced, Pattern of Fire*, at <http://www.planetquake.com/bootcamp/tactics/advanced.shtml> (Jan. 26, 1998) (instructing players on how to define pattern of fire). Players are advised:

When you get within point blank range of a victim, use any automatic weapon to rip them [sic] in half. Start at the feet, and work your way to the [victim’s upper left]. If your opponent attempts to run away, you are already tracking them [sic] . . . so it is much easier to kill them [sic].

Id.

7. See *The Quake II Bootcamp: Tactics: Advanced, Overestimate Your Foes*, at <http://www.planetquake.com/bootcamp/tactics/advanced.shtml> (Feb. 17, 1998) (warning players that once they “become very skilled at Quake II, [they] begin to find that the average Quaker is very unchallenging to kill” and should therefore overestimate every opponent “so [they] will not lose [their] skills”).

8. See *Mortal Kombat Series, Synopsis*, at <http://www.yesterdayland.com/popopedia/shows/arcade/ag1089.php> (last visited Oct. 12, 2002) (“*Mortal Kombat* was one of the bloodiest, goriest, most gruesomely violent games to hit the market [in 1992]. It was also one of the most popular . . .”).

9. See *id.* (“With a series of button and joystick moves, your kombatant [finishes him] – punching the foe’s head off his body, ripping out his spine, causing his head to explode, ripping out his heart, charring his body, etc.”); see also Stuart Clarke, *Guts and Glory*, SYDNEY MORNING HERALD, Oct. 17, 1998, at 18 (noting newer version of game, *MK4*, allows player to “chop [an opponent] into pieces [and] . . . contains weapons as well as hand-to-hand fighting, with each character able to pull out a blade of choice (mace, spiked club, sword, cross bow, boomerang, etc [sic]) at any time throughout the bout”).

10. See Douglass C. Perry, *The Cinematic Touch of Grand Theft Auto III*, at <http://ps2.ign.com/articles/098/098930p1.html> (Oct. 9, 2001) (interviewing game publisher’s lead analyst, Adam Davidson, who described game’s integration of “cut-scenes”). The premise of the game is as follows:

Grand Theft Auto III tells the story of a love-tarnished bank robber-punk whose girlfriend has shot him, stolen his goods, almost lands him in the slammer, and who is now on the loose with a rival urban warlord. As the anonymous ground-level criminal seeking payback and a strange kind of truth, your job is to find out what happened, who’s in control, and how you can do something about it. By performing numerous tasks, learning everything there is to know about Liberty City, and by making your way up through the ranks of the Mafia, you learn these things, and much, much more.

Id.

unsuspecting driver—if especially lucky, an ambulance driver or police officer—and then pilfers the vehicle, has sex with a prostitute to restore health diminished by bullet wounds, and garners fortune by pocketing the prostitute's cash after pummeling her, pushing her out of the vehicle, and driving over her body.¹¹ Myriad acts of violence and vandalism are at a player's fingertips throughout a wild ride of looting and killing.¹²

Even more recently in 2002, *Hitman 2* was released, empowering the player to take on the persona of "Agent 47," a hired assassin sought out by organized criminals for his killing prowess.¹³ The player starts in Sicily and then travels to Japan, Russia, Malaysia, and India, accomplishing killing missions and acquiring an arsenal of weapons, including a knife, magnums, silenced handguns, colts, a sniper rifle, shotguns, submachine guns, ninja swords, axes, fiber wire, and crossbows.¹⁴ The player is ranked based on number of assassinations and style of killing, and assigned a title, such as Wimp, Thug, Hatchet Man, Slayer, Butcher, Mass Murderer, and the coveted Silent Assassin.¹⁵

11. See *Tips and Tricks*, at <http://home1.swipnet.se/~w-13110/> (last visited Sept. 30, 2002) (on file with author) (providing tips for avid players). Players are advised:

[I]f you run over a person you get \$100 . . . , but if you take a[n] ambulance or a firetruck, you get \$200 When you steal a person[']s car, if you run the driver over you get \$700 If you use a flamethrower to kill the cops you get lots of points In fact, use the flamethrower to kill everyone. It[']s fun to watch people die and you get bunches of points.

Id.

12. See Chip & Jonathan Carter, *Inside the Video Games*, BOSTON GLOBE, Nov. 24, 2001, at G12. The game is played as follows: "You roam big-city streets looking for vehicles to jack and havoc to wreak. Need some cash? Rob a passerby. Wanna really secure your spot in hell? Wait for the ambulance to arrive at the scene, then bust up the driver and jack his ride." *Id.*

13. See *Hitman 2: Silent Assassin*, at <http://www.pcgameworld.com/game.php/id/1228> (last visited Oct. 13, 2002) ("Enter the realm of a retired assassin, forced back into action by treason. You [are] a hired killer . . . [v]isit[ing] the dark recesses of a world corrupted by crime, greed, degradation and dishonour [sic].").

14. See Douglass C. Perry, *Hitman 2: Silent Assassin*, at <http://ps2.ign.com/articles/372/372904p1.html> (Oct. 2, 2002) ("*Hitman 2* takes players into the world of high-level government conspiracies, diplomatic imbroglios and millionaire businessmen with a penchant for illegal activities. . . . [T]he weapon cache is healthy and satisfying, giving gamers the happy tools of the assassin trade").

15. See *HitMan2 Rankings*, at <http://www.hitmanforum.com/forum/view-thread.php?tid=65> (last visited Oct. 13, 2002) (posting players' input regarding rankings). To achieve Thug status, one player commented, "[I] killed only two, but barg[ed] past hordes of enemies" *Id.* To be coined Slayer, the player committed five to seven assassinations, and for Hatchet Man, he committed eight. See *id.* Another player commented, "one time I sniped everybody and got BUTCHER!" *Id.*

Ultimately, *Hitman 2*'s concept and gory graphics shocked cable television stations, including adult networks such as MTV, Comedy Central, Sci-Fi, and USA, inducing them to ban broadcast of the game's original advertisement.¹⁶ Nevertheless, this game and the others described above represent the most popular video games of today's youth, demonstrating a gigantic leap from *Pac-Man*, *Frogger*, *Donkey Kong*, and *Q*bert*, where the tasks were as innocuous as eating yellow dots, crossing busy streets, climbing ladders, and changing the colors of cubes.¹⁷

Psychologists believe violent video games contribute to juvenile violence by exposing impressionable minds to dangerous behaviors without the real-life consequences.¹⁸ Their research shows that these video games are detrimental to children for four reasons.¹⁹

16. See *New, Mostly Non-Banned Hitman 2 Commercial*, at <http://ps2.ign.com/articles/374/374186p1.html> (Oct. 11, 2002) (noting approval of all but one network to broadcast new, less graphic version of original commercial).

17. See *Arcade Games*, at <http://www.yesterdayland.com/popopedia/shows/categories/arcade/> (last visited Oct. 12, 2002) (noting evolution of video games from 1980s to 1990s and present); see also *Donkey Kong, Synopsis*, at <http://www.yesterdayland.com/popopedia/shows/arcade/ag1041.php> (last visited Oct. 12, 2002) (describing *Donkey Kong*, released in 1981, in which carpenter "moved up through levels of steel girders to reach Donkey Kong and [kidnapped girlfriend] Pauline at the top Once all the supports were gone, Donkey Kong fell straight down on his ape noggin, and the happy human couple was reunited."); *Frogger, Synopsis*, at <http://www.yesterdayland.com/popopedia/shows/arcade/ag1051.php> (last visited Oct. 12, 2002) (stating objective of *Frogger*, released in 1981, "was almost Zen-like: to get to the other side. . . . Using the joystick to hop up, down, left and right, you guided your frog pal up and around [zooming cars, trucks, buses, snakes, alligators and unpredictable turtles] to the relative safety of a dirt median."); *Pac-Man Series, Synopsis*, at <http://www.yesterdayland.com/popopedia/shows/arcade/ag1100.php> (last visited Oct. 12, 2002) (describing *Pac-Man*, released in 1980, as "the most successful arcade game in history, [where a] little yellow orb with [an] enormous mouth . . . [ate] little power pellets, dots of energy that lined the corridors of a bright blue maze [while dodging] [f]our pastel-colored ghosts"); *Q*bert, Synopsis*, at <http://www.yesterdayland.com/popopedia/shows/arcade/ag1111.php> (last visited Oct. 12, 2002) ("Q's purpose in life was to hop around the tops of . . . cubes, changing every square to a specific color (i.e. - from blue to yellow) [In] later rounds, cubes had to be touched twice, cubes changed back to the wrong color if they got hopped on again, etc.).

18. See Tara C. Campbell, Comment, *Did Video Games Train the School Shooters to Kill? Determining Whether Wisconsin Courts Should Impose Negligence or Strict Liability in a Lawsuit Against the Video Game Manufacturers*, 84 MARQ. L. REV. 811, 818 (2001) (explaining psychologists' theories that violent video games contribute to juvenile violence as seen in high school massacres); see also Joe Holleman, *Violent Videos Take Some Hits*, ST. LOUIS POST-DISPATCH, Aug. 27, 2000, at EV1 (linking violent video games to Columbine High School incident, where teenaged murderers were violent video game enthusiasts).

19. See Campbell, *supra* note 18, at 818-22 (labeling four harms as (1) operant conditioning, (2) stimulus addiction, (3) problem solving approaches, and (4) desensitization); see also Holleman, *supra* note 18, at EV3 (explaining results of studies by psychologists Karen E. Dill and Craig A. Anderson on "effects of video-game

First, they teach children that they must kill or inflict violence to receive points and ultimately win.²⁰ Such conditioning trains children to equate violence with rewards.²¹ Second, experts believe violent video games create stimulus addiction.²² Each time a child plays, he or she craves increased violence.²³ A child must experience more violence to attain the same emotional high because the violence already realized becomes familiar, and thus less stimulating.²⁴ Third, psychologists believe violent video games teach children unhealthy problem-solving techniques.²⁵ Psychologists are concerned that the games teach children that violence achieves goals and resolves all conflicts in life.²⁶ Finally, psychologists fear violent video games desensitize children to killing, death, and vio-

playing on people's aggressive tendencies, as well as the effect on overall intelligence," in differentiating from those effects caused by mere television).

20. See Campbell, *supra* note 18, at 818-19 ("[W]hen playing a video game, a player kills someone and is rewarded by receiving points and advancing to higher levels."); Holleman, *supra* note 18, at EV3 (equating video games with gambling because of system of rewards, except that with video games, "it is aggressive behavior (kill[ing], for example) that gets you . . . rewards").

21. See Campbell, *supra* note 18, at 818-19 (explaining as result of operant conditioning, "the video game player essentially becomes trained to . . . caus[e] harm to others"); Holleman, *supra* note 18, at EV3 (noting player becomes participant rather than spectator by choosing character, determining strategy, and executing it to earn reward).

22. See Campbell, *supra* note 18, at 819-20 (describing emotional response from playing video games that is absent when simply watching television); see also Holleman, *supra* note 18, at EV3 (noting video game playing induces brain to secrete addictive pleasure chemical called dopamine, usually associated with sexual activity or drug use).

23. See Campbell, *supra* note 18, at 819 (noting cravings can be satisfied by more violence and higher levels in video games).

24. See *id.* at 819-20 (theorizing Columbine killers and other teenaged killers in similar high school massacre advanced to next level of violence by "playing a real-life video game - setting bombs in a public setting, such as a school, and shooting any occupants").

25. See *id.* at 820-21 (noting "difference between the problem solving approach taken by children who play violent video games as compared to children who play non-violent video games, such as *Tetris* and other puzzle or treasure-hunt games"); Art Golab, *Officer Organizes Video Game Turn-In*, CHI. SUN-TIMES, Dec. 4, 2000, at 8 (discussing police officer Dan Huck's request that parents and children turn in violent video games because of harm caused to children); Eileen Nechas & Denise Foley, *Researchers Look at Video Games' Link to Violence*, HOUS. CHRON., Feb. 22, 2001, at 6 (answering teenager's question to health columnists as to whether his parents should be concerned about his playing violent video games).

26. See Campbell, *supra* note 18, at 820-21 (explaining violent video games teach children to eliminate obstacles by killing, whereas non-violent video games teach children to solve problems using creativity and patience); Golab, *supra* note 25, at 8 (stating violent video games teach children that violence creates means to end); Nechas & Foley, *supra* note 25, at 6 (noting violent video games teach aggressive solutions to problems).

lence in general.²⁷ The poignant devastation of human life at Columbine High School in 1999, caused by two violent video game enthusiasts attempting to incarnate *Doom*, vividly demonstrates how these games can leave children completely unaffected by human suffering and even death.²⁸ Such apathy begs the question of whether these children know that in real life, they cannot just hit the reset button and play again.

The case at issue in this Note is *American Amusement Machine Association v. Kendrick*.²⁹ In this case, the Seventh Circuit held it unconstitutional to require parental or custodial supervision of children at public arcades that house violent video games.³⁰ Accordingly, this Note begins with the history and background of the First Amendment.³¹ The general exceptions to First Amendment protection follow.³² This Note demonstrates that the Supreme Court, having yet to conclude whether violent imagery renders material unprotected by the First Amendment and whether video games qualify as speech, has relegated the debate to the circuit, district, and state courts; the district and state courts concluding that the First Amendment does not protect video games because they are not speech.³³ In any event, the Supreme Court has validated regulations abridging the freedom of speech when children's health and morals were at stake.³⁴ This Note suggests that based on legal precedent rendering video games unprotected

27. See Campbell, *supra* note 18, at 821-22 (illustrating, as example of desensitization, trained soldiers in World War II hesitated to pull trigger eighty-five percent of time, but after military utilized video games in training, such reluctance diminished to five percent while willingness to kill rose to over ninety-five percent, with *Doom* being one of video games used); Golab, *supra* note 25, at 8 (noting desensitization effect).

28. See Charlie Condon, *Should States Sue the Entertainment Industry as They Did Big Tobacco? Yes: Hollywood Is Targeting Youth and Hitting the American Family Between the Eyes*, INSIGHT ON THE NEWS, Oct. 30, 2000, at 41-42 (explaining "Pied Piper" effect of entertainment media in leading children toward destruction, and resulting potential for another high school massacre). For a discussion of the Columbine killers, see *infra* notes 194-95 and accompanying text.

29. 244 F.3d 572 (7th Cir. 2001).

30. See *id.* at 580 (granting preliminary injunction preventing City from enforcing ordinance because harm ordinance would cause plaintiffs outweighed City's need for ordinance).

31. For a discussion of the origins of the First Amendment, see *infra* notes 36-43 and accompanying text.

32. For an account of First Amendment exceptions, see *infra* notes 44-88 and accompanying text.

33. For a discussion of the Supreme Court's failure to decide the issue and the lower courts' analyses, including that of the Seventh Circuit in *Kendrick*, see *infra* notes 89-157 and accompanying text.

34. For a discussion of children's diminished level of First Amendment protection, see *infra* notes 53-56, 66-67 and accompanying text.

by the First Amendment and various studies on the detrimental effects of violent video games, the Seventh Circuit in *Kendrick* may have overlooked both the dangers these games present to children and the games' lack of speech, thereby overextending the First Amendment.³⁵

II. BACKGROUND

A. The First Amendment

The First Amendment of the Constitution pronounces that "Congress shall make no law . . . abridging the freedom of speech."³⁶ The Framers devised this protection to counter the English suppression of speech, which criminalized the voicing of divergent beliefs, specifically seditious libel.³⁷ The First Amendment lies at the heart of a democratic society encouraging diversity of thought, belief, and self-expression.³⁸

While First Amendment function at the time of its conception is clear, scholars continue to debate the Framers' overarching intent.³⁹ The means by which Americans express themselves have evolved since 1791, and consequently, so too has the breadth of the First Amendment.⁴⁰ The Framers may never have anticipated curtailing free speech to protect children or society as a whole.⁴¹ Technological advancements, which have caused a major proliferation in the channels of communication and entertainment, have made the United States government increasingly aware of the need to limit speech.⁴² Therefore, the Supreme Court has defined certain

35. For a critical analysis of the *Kendrick* court's holding, see *infra* notes 158-223 and accompanying text.

36. U.S. CONST. amend. I.

37. See ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 11.1.1, at 748-49 (Aspen Law & Bus. 1997) (explaining England's Star Chamber, which criminalized public criticism of King). Chief Justice Holt wrote for the English court in 1704, "[i]f people should not be called to account for possessing . . . an ill opinion of the government, no government can subsist. For it is very necessary for all governments that the people should have a good opinion of it." *Id.*

38. See *id.* § 11.1.2, at 750-56 (categorizing non-mutually exclusive theories of First Amendment protection as self-governance, discovering truth, advancing autonomy, and promoting tolerance).

39. See *id.* § 11.1.1, at 749 (stating little indication remains of Framers' intent beyond abolishing restraints on speech in form of seditious libel).

40. For an analysis of various emerging modes of communication under the First Amendment, see *infra* note 42 and accompanying text.

41. See CHEMERINSKY, *supra* note 37, § 11.1.1, at 749 ("[N]othing in the historical record sheds light on most of the free speech issues that face society and the courts in the late twentieth century.").

42. See *Denver Area Educ. Telecomms. Consortium v. FCC*, 518 U.S. 727, 742 (1996) (Breyer, J., plurality opinion) (noting "changes taking place in the law, the

situations denying speech First Amendment protection if, for instance, outweighed by some other interest or concern.⁴³

B. Exceptions to First Amendment Protection

The Supreme Court has declared that “the unconditional phrasing of the First Amendment was not intended to protect every utterance. . . . All ideas . . . have the full protection of the guaranties, *unless excludable* because they encroach upon the limited area of more important interests.”⁴⁴ The Supreme Court has defined certain interests that it deems substantial enough to outweigh First Amendment protection.⁴⁵ For instance, in *Brandenburg v. Ohio*,⁴⁶ the Court stated that speech inciting imminent lawless activity is not protected under the First Amendment.⁴⁷ Similarly, in *Chaplinsky v.*

technology, and the industrial structure related to telecommunications” have made First Amendment challenges more difficult in decision upholding regulation on offensive cable television broadcasts because highly accessible to children); *see also* *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803, 811-15 (2000) (invalidating government’s regulation of cable television indecency because content-based and not least restrictive means to protect children from exposure); *Reno v. ACLU*, 521 U.S. 844, 877-82 (1997) (striking down governmental restriction on “indecent” and “patently offensive” communications over Internet because overbroad); *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 131 (1989) (limiting government’s power to regulate indecent but not obscene pre-recorded “dial-a-porn” telephone messages to only what is necessary to shield children, thereby striking down total ban); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 52 (1986) (holding city had power to regulate location of adult movie theaters); *FCC v. Pacifica Found.*, 438 U.S. 726, 738 (1978) (using nuisance rationale to validate government’s limitation on radio broadcasts of indecent but not obscene “Filthy Words” to times when children would most likely not be exposed); *Rothner v. City of Chicago*, 929 F.2d 297, 304 (7th Cir. 1991) (holding government had power to regulate children’s use of video games at arcades during school hours).

43. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 382-83 (1992) (“[There are] a few limited areas [of speech], which are ‘of such slight social value . . . that any benefit that may be derived from them is clearly outweighed by the social interest in [restricting them].’” (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942))); *Sable*, 492 U.S. at 126 (“The government may . . . regulate the content of constitutionally protected speech in order to promote a compelling interest . . .”).

44. *Roth v. United States*, 354 U.S. 476, 483-84 (1957) (emphasis added) (“[I]mplicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance.”).

45. *See R.A.V.*, 505 U.S. at 383 (stating categories of unprotected speech that government has broad power to regulate are obscenity, defamation, and fighting words).

46. 395 U.S. 444 (1969).

47. *See id.* at 447 (striking down convictions of Ku Klux Klan members for advocating violent action because violence was not imminent, and speech was therefore mere advocacy, which First Amendment protects).

New Hampshire,⁴⁸ the Court asserted that the government could forbid speech calculated to provoke a fight.⁴⁹

The Supreme Court carved out another exception to First Amendment protection in *Roth v. United States*,⁵⁰ where it held obscenity to be unprotected speech.⁵¹ The Court defined obscenity as "material which deals with sex in a manner appealing to the prurient interest . . . material having a tendency to excite lustful thoughts."⁵² In *Ginsberg v. New York*,⁵³ the Court expanded the obscenity exclusion by demanding a broader definition of what is obscene for children because children receive a lower level of First Amendment protection than adults.⁵⁴ The Court stated:

Material which is protected for distribution to adults is not necessarily constitutionally protected from restriction upon its dissemination to children. . . . Because of the State's exigent interest in preventing distribution to children of objectionable material, it can exercise its power to protect the health, safety, welfare and morals of its community by barring the distribution to children of books recognized to be suitable for adults.⁵⁵

The Court further held that parties need not present scientific evidence to show a rational relationship between the regulation and the objective of safeguarding children.⁵⁶

48. 315 U.S. 568 (1942).

49. *See id.* at 569-72 (defining fighting words as "those which by their very utterance inflict injury or tend to incite an immediate breach of the peace," in upholding conviction of Jehovah's Witness for calling public marshal "a damned Fascist" and "a God damned racketeer").

50. 354 U.S. 476 (1957).

51. *See id.* at 492 (upholding conviction of businessman for mailing obscene materials); *see also* *Miller v. California*, 413 U.S. 15, 36-37 (1973) (following *Roth*, and applying three-prong test for obscenity: (1) average person, applying contemporary community standards, would find that work, taken as whole, "appeals to prurient interest;" (2) work depicts or describes, in patently offensive way, sexual conduct specifically defined by state; and (3) work, taken as whole, lacks serious political, artistic, scientific, or literary value).

52. *Roth*, 354 U.S. at 487.

53. 390 U.S. 629 (1968).

54. *See id.* at 636 (upholding constitutionality of statute that forbade sale of "girlie" magazines depicting nudity to minors).

55. *Id.* (quoting *Bookcase, Inc. v. Broderick*, 218 N.E.2d 668, 671 (N.Y. 1966)).

56. *See id.* at 642-43 ("We do not demand of legislatures 'scientifically certain criteria of legislation.' . . . We therefore cannot say that [the statute at issue], in defining the obscenity of material on the basis of its appeal to minors under 17, has no rational relation to the objective of safeguarding such minors from harm." (quoting *Noble State Bank v. Haskell*, 219 U.S. 104, 110 (1911))).

In *Paris Adult Theatre I v. Slaton*,⁵⁷ the Court likewise held that “[t]he States have a long-recognized legitimate interest in regulating the use of obscene material in local commerce and in all places of public accommodation”⁵⁸ The Court relied on a report on pornography “[indicating] that there is at least an arguable correlation between obscene material and crime.”⁵⁹ The Court thus held that the First Amendment does not attach to speech or material that lacks “serious literary, artistic, political or scientific value as communication.”⁶⁰ One year later, the Supreme Court expanded this principle, holding that the First Amendment protects conduct or speech only if intended to convey a particularized message and if, in the surrounding circumstances, the likelihood is great that those who view the message will understand it.⁶¹

The Supreme Court generated the most prevalent test for determining whether an abridgement of speech is constitutional in *United States v. O’Brien*.⁶² There, the Court stated that “a sufficiently important governmental interest in regulating [speech] can justify incidental limitations on First Amendment freedoms.”⁶³ A regulation is valid if it satisfies the following four requirements:

1. It is within the constitutional police power of government;
2. It furthers an important or substantial governmental interest;
3. The governmental interest is unrelated to the suppression of free speech; and
4. The regulation is no more restrictive than necessary to further the governmental interest.⁶⁴

Examining the first constraint, the Court has held that the government acts within its constitutional police power when it regulates to protect the health, safety, welfare, or morals of the

57. 413 U.S. 49 (1973).

58. *Id.* at 57.

59. *Id.* at 58.

60. *Id.* at 67.

61. *See Spence v. Washington*, 418 U.S. 405, 410-11 (1974) (noting appellant’s peaceful use of flag was “pointed expression of anguish . . . about the then-current domestic and foreign affairs of . . . government,” and thus protected by First Amendment).

62. 391 U.S. 367, 377 (1968) (validating statute that prohibited destruction of draft card because of substantial interest in Congress’s need to raise and support armies).

63. *Id.* at 376.

64. *See id.* at 377 (finding 1965 Amendment to § 12(b)(3) of Universal Military Training and Service Act compliant with all four requirements, validating conviction of O’Brien for violating Act).

community.⁶⁵ The Court has expressed more specifically that protecting the safety, morals, and general well-being of children is a substantial interest that may justify abridging speech.⁶⁶ For this reason, courts have upheld bans on distributing obscenity to children, but not adults.⁶⁷

To overcome the second *O'Brien* constraint, the government must show that the regulated activity frustrates the government's substantial interest.⁶⁸ The government need not submit its own novel studies as evidence.⁶⁹ It merely must demonstrate the reasonableness of concluding that the regulation will combat interference with the government's substantial interests.⁷⁰ For instance, in *City of Renton v. Playtime Theatres, Inc.*,⁷¹ the court of appeals had held that the studies presented, showing negative effects of adult thea-

65. See *City of Erie v. Pap's A.M.*, 529 U.S. 277, 296 (2000) (O'Connor, J., plurality opinion) (stating city's efforts to protect public health and safety are undoubtedly within its police powers); *Ginsberg v. New York*, 390 U.S. 629, 636-37 (1968) (noting state's power to protect health, safety, welfare, and morals of community when threatened by distribution of objectionable material to children); *Winters v. New York*, 333 U.S. 507, 510 (1948) (recognizing importance of police power); see also *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 71 (1976) (Stevens, J., plurality opinion) ("[T]he city's interest in attempting to preserve the quality of urban life is one that must be accorded high respect.").

66. See *Ginsberg*, 390 U.S. at 636 ("Because of the state's exigent interest in preventing distribution to children of objectionable material, it can exercise its power to protect the health, safety, welfare and morals of its community by barring the distribution to children" (quoting *Bookcase, Inc. v. Broderick*, 218 N.E.2d 668, 671 (N.Y. 1966))); see also *Sable Communications of Cal. v. FCC*, 492 U.S. 115, 126 (1989) (finding compelling interest in "protecting physical and psychological well-being of minors"); *Rothner v. City of Chicago*, 929 F.2d 297, 303 (7th Cir. 1991) (validating restriction on playing video games during school hours due to government's substantial interest in encouraging minors to complete high school education).

67. See *Action for Children's Television v. FCC*, 58 F.3d 654, 656 (D.C. Cir. 1995) (confirming government's compelling interest in protecting children under age of eighteen from indecent broadcasts).

68. See *O'Brien*, 391 U.S. at 378-82 (finding ban on destruction of draft cards rational regulation for ensuring Congress's ability to raise armies because government's purpose of issuing draft cards would be defeated if certificates were destroyed or mutilated).

69. See *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 51-52 (1986) ("The First Amendment does not require a city . . . to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses."); *O'Brien*, 391 U.S. at 378-82 (upholding constitutionality of statute despite government's failure to present studies or evidence showing harm).

70. See *O'Brien*, 391 U.S. at 377-78 (basing its decision that ordinance furthered substantial interest on reasonableness that prohibiting mutilation of draft cards would promote Congress's efficiency in raising armies, not on scientific evidence of such).

71. 475 U.S. 41 (1986).

ters on communities, were insufficient to justify regulation because they were conducted in other cities.⁷² The Supreme Court subsequently reversed that decision, concluding that Renton did not need to conduct its own studies.⁷³ The city could rely on studies conducted in Seattle “so long as whatever evidence the city relie[d] upon [was] reasonably believed to be relevant to the problem that the city [was addressing].”⁷⁴ The Seattle study on the negative effects of adult films was sufficient to show that the ordinance furthered a substantial governmental interest because it was reasonably related to Renton’s substantial interest in preventing neighborhood blight through its regulation of adult theaters.⁷⁵

Addressing the third constraint, courts have created an important distinction, which has become a primary test for determining whether a regulation of speech is constitutional.⁷⁶ This is the distinction between content-neutral and content-based speech.⁷⁷ The *O’Brien* Court indicated that for a regulation to be valid, its purpose must be to banish the “nonspeech element” of the speech alone, and not the speech itself.⁷⁸ This “nonspeech element” represents the “noncommunicative impact” of the speech.⁷⁹ For instance, in *O’Brien*, the speech element was the burning of a draft card, and

72. See *id.* at 50 (citing court of appeals in its criticism of city’s justifications for ordinance as being “conclusory and speculative”).

73. See *id.* at 50-52 (“We think the Court of Appeals imposed on the city an unnecessarily rigid burden of proof.”).

74. *Id.*

75. See *id.* (disregarding fact that Seattle chose different method of adult theater zoning than that chosen by Renton because irrelevant to holding).

76. For a discussion of the distinction between content-neutral and content-based speech, see *infra* notes 77-82 and accompanying text.

77. See, e.g., *City of Erie v. Pap’s A.M.*, 529 U.S. 277, 289 (2000) (O’Connor, J., plurality opinion) (applying *O’Brien* test to public indecency statute restricting nude dancers in adult entertainment establishments); *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 642-43 (1994) (applying *O’Brien* test to “must-carry” provisions of Cable Television Consumer Protection and Competition Act of 1992, which compelled broadcasters to carry signals of certain local television stations), *aff’d*, 520 U.S. 180 (1997); *Renton*, 475 U.S. at 47-48 (evaluating content-neutrality of zoning ordinance regulating adult theaters); *Eclipse Enters., Inc. v. Gulotta*, 134 F.3d 63, 66 (2d Cir. 1997) (addressing content-neutrality of law prohibiting sale to minors of trading cards that depict heinous crime, element of heinous crime, or heinous criminal); *Rothner v. City of Chicago*, 929 F.2d 297, 303 (7th Cir. 1991) (evaluating content-neutrality of ordinance prohibiting children from playing video games when school in session).

78. See *United States v. O’Brien*, 391 U.S. 367, 376-77 (1968) (distinguishing content-based from content-neutral speech); see also *Renton*, 475 U.S. at 49 (finding regulation content-neutral because intended to avoid secondary effect of adult theaters, and not dissemination of offensive speech).

79. See, e.g., *Erie*, 529 U.S. at 291 (finding ordinance on public nudity content-neutral because aimed at controlling negative noncommunicative impact, rather than expression itself).

the nonspeech element, or noncommunicative impact, was the frustration it caused the government in regulating the classification and conscription of manpower for military service.⁸⁰ Thus, if desire to control the secondary effects of speech that frustrates the government's substantial interest motivates regulation, it is content-neutral.⁸¹ If, however, the regulation aims to restrict the content of the speech, in the form of a specific opinion, view, or belief, then it is content-based and subject to strict scrutiny.⁸²

To satisfy the fourth *O'Brien* constraint, the ordinance must not be more restrictive than necessary to further the government's substantial interest.⁸³ In other words, the regulation must be "narrowly tailored" to serve the important governmental interest.⁸⁴ For instance, if the substantial interest is protecting children from exposure to obscene magazines, then the regulation is not narrowly tailored if it applies to children and adults alike; it is, however, narrowly tailored if it applies *only* to children.⁸⁵ A restriction on speech must preserve ample alternative channels of communication for the restricted material.⁸⁶ For example, a valid regulation on children's exposure to harmful material allows the communicator of the message to continue distributing his or her materials to

80. See *O'Brien*, 391 U.S. at 377 ("The power of Congress to classify and conscript manpower for military service is 'beyond question.'" (quoting *Lichter v. United States*, 334 U.S. 742, 756 (1948))).

81. See *id.* at 382 (validating statute because constrained to noncommunicative aspect of *O'Brien's* conduct and not aimed at its specific content).

82. See, e.g., *Eclipse Enters., Inc. v. Gulotta*, 134 F.3d 63, 67 (2d Cir. 1997) (finding ordinance content-based and invalid due to lack of apparent secondary effects of banned trading cards).

83. See *O'Brien*, 391 U.S. at 381-82 (finding regulation valid because it prohibits conduct that interferes with government's substantial interest and does nothing more).

84. See *Ward v. Rock Against Racism*, 491 U.S. 781, 798-99 (1989) (reading *O'Brien* requirement of least restrictive means to infer that restriction be narrowly tailored). The Court stated that "the requirement of narrow tailoring is satisfied so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." *Id.*

85. See *Sable Communications of Cal. v. FCC*, 492 U.S. 115, 128 (1989) (finding regulation of pre-recorded sexual phone messages not narrowly tailored because total ban, when "credit card, access code, and scrambling rules were a satisfactory [and less-restrictive] solution to the problem of keeping indecent dial-a-porn messages out of the reach of minors"); *Rothner v. City of Chicago*, 929 F.2d 297, 303-04 (7th Cir. 1991) (finding ordinance narrowly tailored because prohibited persons under seventeen only from playing video games during school hours).

86. See *Rothner*, 929 F.2d at 303 (finding ordinance narrowly tailored because it left open ample alternative channels for communication of information).

adults.⁸⁷ This condition prevents excessive bans when less harsh restrictions would accomplish the objective as effectively.⁸⁸

C. Violence and Video Games

While the Supreme Court maintains the constitutionality of certain restrictions on freedom of speech because of more important state interests, it has yet to conclude whether the negative effects from children's exposure to violence is one of those critical interests.⁸⁹ It has revealed that television, radio, film, and magazines are all within the ambit of speech.⁹⁰ Meanwhile, it remains unclear whether video games qualify as speech for First Amendment purposes.⁹¹

Numerous district and state courts have held that the First Amendment does not protect video games because video games lack sufficient expressive content.⁹² Recently, in *Interactive Digital*

87. For examples of what has and has not satisfied the "narrowly tailored" requirement, see *supra* notes 85-86 and accompanying text.

88. See *Ward*, 491 U.S. at 798-99 (interpreting least restrictive means requirement advanced by *O'Brien* to mean, "[s]o long as the means chosen are not substantially broader than necessary to achieve the government's interest," the ordinance survives).

89. See *Am. Amusement Mach. Ass'n v. Kendrick*, 115 F. Supp. 2d 943, 954 (S.D. Ind. 2000) (inferring obscenity, fighting words, and defamation are only categories of unprotected speech that government has power to regulate as to adults), *rev'd*, 244 F.3d 572 (7th Cir. 2001); see also Patricia M. Wald, *Doing Right by Our Kids: A Case Study in the Perils of Making Policy on Television Violence*, 23 U. BALT. L. REV. 397, 407 (1994) ("[T]he law [may] some day recognize a category of violent material so outrageous and lacking in information or artistic merit as to fall outside the First Amendment altogether, in the manner of obscenity, but thus far such a concept is confined to the law journals alone.").

90. See *Ginsberg v. New York*, 390 U.S. 629, 631 (1968) (applying First Amendment to "girlie" magazines); see also *Borger by Borger v. Bisciglia*, 888 F. Supp. 97, 99-101 (E.D. Wis. 1995) (applying First Amendment to videos shown in classrooms). For a discussion of other applications of the First Amendment to various modes of speech, see *supra* notes 42-88 and accompanying text.

91. See *Rothner*, 929 F.2d at 302-03 ("confess[ing] an inability to comprehend fully the video game[s] of the 1990s," and thus whether games convey to users significant artistic or educational message worthy of First Amendment protection); see also Matthew Hamilton, Comment, *Graphic Violence in Computer and Video Games: Is Legislation the Answer?*, 100 DICK. L. REV. 181, 190 (1995) (noting Supreme Court's silence as to whether video games warrant First Amendment protection, and need for resolution).

92. See *Interactive Digital Software Ass'n v. St. Louis County*, 200 F. Supp. 2d 1126, 1133 (E.D. Mo. 2002) ("Courts almost unanimously [have] held that video games lack[] the expressive element necessary to trigger the First Amendment."); see also *Malden Amusement Co. v. City of Malden*, 582 F. Supp. 297, 299 (D. Mass. 1983) ("It cannot be said that a person has a constitutional right to play video games in an arcade that is not an 'accessory to or incidental to only recreational business use.'" (quoting Malden, Mass., Revised Ordinance ch. 13, § 34(2) (June 2, 1982))); *Am.'s Best Family Showplace Corp. v. City of New York, Dep't of Bldgs.*, 536 F. Supp. 170, 174 (E.D.N.Y. 1982) (holding "video games do not implicate

Software Association v. St. Louis County,⁹³ the district court likened video games to *Bingo*, and “fail[ed] to see how [they] express ideas, impressions, feelings, or information” necessary to trigger First Amendment protection.⁹⁴ The court further equated video games with sports unprotected by the First Amendment, such as baseball, hockey, and boxing, and recognized that video games do not become a form of expression simply because they are in video form or because they contain violence.⁹⁵

While district and state courts hold “almost unanimously” that the First Amendment does not protect video games, the Supreme Court has yet to respond.⁹⁶ With such limited guidance, circuit courts have struggled to apply the Supreme Court’s unprotected categories both to ordinances intended to deter violence and to those restricting video games.⁹⁷ *Kendrick* is the only circuit court

First Amendment [rights]” because they are not meant to inform); *Caswell v. Licensing Comm’n*, 444 N.E.2d 922, 927 (Mass. 1983) (concluding First Amendment protection does not extend to video games because they are merely technologically advanced games).

93. 200 F. Supp. 2d 1126 (E.D. Mo. 2002).

94. *See id.* at 1134 (“The [c]ourt has trouble seeing how an ordinary game with no First Amendment protection, can suddenly become expressive when technology is used to present it in ‘video’ form.”).

95. *See id.* at 1134-35. The court reasoned:

[T]he game of baseball is not a form of expression entitled to free speech protection. It is often times surrounded by speech and expressive ideas — music between innings, fans carrying signs with expressive messages — however, these expressive elements do not transform the game of baseball into “speech.” Rather it remains, just what it is — a game. Nor does the [c]ourt think there is some magical transformation when this game of baseball appears in video form. The objectives are still the same — to score runs—and the only difference is a player pushes a button or swings a “computer bat,” rather than swinging a wooden bat. . . . [Likewise,] if within [a] hockey game two players get in a fight, or someone gets sliced with a hockey stick and blood flies, the game does not suddenly become a form of expression. Another applicable analogy is boxing, where the main objective is to punch and knock out the opponent. However, boxing is still just a sport, not speech. In the same light, video games do not become a form of expression just because they contain violence.

Id.

96. For a discussion of the district and state courts’ treatment of violence and video games under the First Amendment, see *supra* notes 92-95, *infra* note 161 and accompanying text.

97. *See Eclipse Enters., Inc. v. Gulotta*, 134 F.3d 63, 67 (2d Cir. 1997) (finding it unnecessary to determine if carefully delimited and properly tailored restrictions on distribution of violence to minors can *ever* pass strict scrutiny); *Video Software Dealers Ass’n v. Webster*, 968 F.2d 684, 689 (8th Cir. 1992) (finding no need to decide if states can prescribe dissemination of material depicting violence to minors); *Rothner v. City of Chicago*, 929 F.2d 297, 303 (7th Cir. 1991) (demonstrating inability to conclude whether *all* video games are unprotected by First Amendment).

case that has dealt with both issues together in its consideration of an ordinance restricting children's access to violent video games.⁹⁸

The Seventh Circuit considered the constitutionality of a restriction on children's access to video games during school hours in *Rothner v. City of Chicago*.⁹⁹ The court held that the ordinance was constitutional.¹⁰⁰ In reaching this conclusion, the court first found the restriction to be content-neutral because it was aimed at all video games, regardless of content.¹⁰¹ Second, it held that the government had a substantial interest in improving children's education because there are "few interests more compelling than [the] interest in insuring that children receive an adequate education."¹⁰² Third, the court inferred that the ordinance furthered that interest because children would be encouraged to be in school, instead of at an arcade.¹⁰³ Finally, the court concluded that the regulation was narrowly tailored because it left open alternative channels of expression by allowing the arcades to be available to adults, as well as to children on weekends, during school vacations, and after school hours on weekdays.¹⁰⁴ What is of major significance to this Note is that the court refused to say whether all video

98. See *Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572, 574-80 (7th Cir. 2001). For the background and analysis of this case, see *infra* notes 121-57 and accompanying text.

99. 929 F.2d at 302-04 (arguing ordinance's purpose, to encourage all minors to complete at least high school education and to discourage truancy, was unrelated to content of speech). Moreover, the ordinance was valid because it left open alternate channels for communication of information while being narrowly tailored to serve an important governmental interest. See *id.*

100. See *id.* at 303-04 (declaring ordinance content-neutral, narrowly tailored, and in furtherance of state's legitimate interest).

101. See *id.* at 303. For a discussion of the content-neutral requirement under a First Amendment analysis, see *supra* notes 78-82 and accompanying text.

102. *Rothner*, 929 F.2d at 303. For a discussion of the protections of the safety, morals, and general well-being of children as substantial interests, see *supra* notes 65-67 and accompanying text.

103. See *Rothner*, 929 F.2d at 303-04. The court did not conclude expressly that the ordinance met this requirement, but it can be inferred that it did through the following language: "Education provides the basic tools by which individuals might lead economically productive lives to the benefit of us all' [and] . . . the City's interest in encouraging these students to complete high school is certainly sufficient to justify the ordinance." *Id.* (quoting *Plyler v. Doe*, 457 U.S. 202, 221 (1982)). For a further discussion of what courts look for in deciding whether an ordinance furthers a substantial state interest, see *supra* notes 68-75 and accompanying text.

104. See *Rothner*, 929 F.2d at 303-04. For an explanation of the "narrowly tailored" requirement, see *supra* notes 83-88 and accompanying text.

games lack artistic merit, and thus First Amendment protection.¹⁰⁵ It, therefore, left this question open for debate.¹⁰⁶

While the Eighth Circuit has not addressed the constitutionality of regulating video games, it has addressed violence by holding that an ordinance regulating violent rental videos was unconstitutional in *Video Software Dealers Association v. Webster*.¹⁰⁷ It began by explaining that violence is different from obscenity, and thus does not fall under the obscenity exception.¹⁰⁸ The court further held that because the ordinance was not narrowly tailored to promote a substantial state interest, it could not withstand constitutional challenge.¹⁰⁹ In particular, because the state failed to define specifically the violence it intended to regulate, the statute was an outright ban on all violence and therefore “unconstitutionally vague.”¹¹⁰ The ordinance was also invalid because it was not narrowly tailored to target the precise source of the alleged harmful effects.¹¹¹ Still, the court refused to answer the more difficult question of whether the government may ever validly restrict access to violent material by abridging speech.¹¹² For instance, had the ordinance been narrowly tailored, it is unclear whether the court would have upheld the restriction.¹¹³

105. See *Rothner*, 929 F.2d at 303 (confessing court's inability to fully comprehend modern video games sufficiently to assess whether some video games rise to level of art or literature, or if they are all merely evolved pinball machines).

106. See *id.* (“[T]he City frankly cautions us that the issue is ‘difficult’ and reminds us that we need not decide it.”).

107. 968 F.2d 684, 688-89 (8th Cir. 1992).

108. See *id.* at 688 (stating without depictions or descriptions of sexual conduct, material containing violence alone cannot be obscene). For a discussion of what qualifies as obscene for First Amendment purposes, see *supra* notes 51-59 and accompanying text.

109. See *Video*, 968 F.2d at 689. The court held that the ordinance was not narrowly tailored because it did not describe the type of violence it proscribed and thus “[a] more precise law limited to slasher films and specifically defining key terms would be less burdensome on protected expression.” *Id.* For a discussion of the “narrowly tailored” requirement, see *supra* notes 83-88 and accompanying text.

110. See *Video*, 968 F.2d at 689 (explaining that to survive vagueness challenge, statute must provide ordinary person reasonable opportunity to know what is prohibited and provide precise standards for those who apply statute).

111. See *id.* For an explanation of the “narrowly tailored” requirement, see *supra* notes 83-88 and accompanying text.

112. See *Video*, 968 F.2d at 689 (“[W]e need not decide whether states can legitimately proscribe dissemination of material depicting violence to minors because Missouri’s statute cannot survive strict scrutiny.”).

113. See *id.* at 691. The court emphasized the need for precise drafting and clear purpose when First Amendment rights are at stake. See *id.* It noted, however, that its holding did not effect whether a state can restrict dissemination of violent videos to children if the ordinance is properly drafted because “we do not belittle the State’s interest in the well-being of minors.” *Id.*

The Second Circuit also tackled the issue of whether the government can regulate the distribution of violent material to children in *Eclipse Enterprises, Inc. v. Gulotta*.¹¹⁴ The court invalidated a county ordinance that banned trading cards of caricatured criminals because it was content-based.¹¹⁵ The court further found the ordinance invalid because there was no proof that it would satisfy the legitimate state interest of "protecting the psychological well-being of minors and . . . combating juvenile crime."¹¹⁶ The court held that without proof of the alleged negative effects to the community from children's use of these cards, the regulation's effect in satisfying the state interest was mere "speculation or surmise," and thus not sufficient to justify abridging speech.¹¹⁷ Due to insubstantial support for the ordinance, the court concluded it was unnecessary, and therefore not narrowly tailored to further a legitimate state interest.¹¹⁸ The court did not hold that such a regulation could *never* exist to restrict violence because it refused to expand its holding beyond the facts of this case.¹¹⁹ Instead, it skirted the issue of whether the regulation would have been valid if the defendants had offered proof that the cards' violent depictions interfered with the state's substantial interest in preventing juvenile crime.¹²⁰

III. AMERICAN AMUSEMENT MACHINE ASSOCIATION V. KENDRICK

At issue in *Kendrick* was whether an Indianapolis ordinance restricting children's access to coin-operated violent video games violated the First Amendment right to free speech.¹²¹ Specifically, the

114. 134 F.3d 63, 66 (2d Cir. 1997).

115. *See id.* at 66-67 (explaining because ordinance was content-based, it was presumptively invalid and had to pass strict scrutiny to overcome presumption). For a discussion of what constitutes content-based speech, see *supra* notes 77-82 and accompanying text.

116. *Eclipse*, 134 F.3d at 67-68. The court explained that the only study presented was that of a connection between television violence and juvenile violence. *See id.* at 68. This was insufficient to show that crime trading cards increased juvenile violence because "TV is a more vibrant medium than trading cards" *Id.*

117. *See id.* at 67-68 (noting county's own experts and supervisor who drafted ordinance conceded to having no support for ordinance).

118. *See id.* at 68. For a discussion of the "narrowly tailored" requirement, see *supra* notes 83-88 and accompanying text.

119. *See Eclipse*, 134 F.3d at 67 (finding it unnecessary "to determine whether carefully delimited and properly tailored restrictions on distribution of non-obscene but otherwise harmful speech to minors . . . can ever [be valid]").

120. *See id.* (limiting holding to facts of case).

121. *See Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572, 573 (7th Cir. 2001). The court recognized that the issue was whether a violation of the video

challenged ordinance forbade persons under the age of eighteen from using any amusement machine deemed "harmful to minors" without the accompaniment of a parent, guardian, or other custodian.¹²² The ordinance defined "harmful to minors" as "an amusement machine that predominantly appeals to minors' morbid interest in violence . . . [and contains] graphic violence."¹²³

The plaintiffs in this case were the manufacturers of video games and their trade association.¹²⁴ They sought a preliminary injunction against the City of Indianapolis to bar enforcement of the ordinance because they claimed it violated their freedom of expression.¹²⁵ The district court held that the ordinance would violate the First Amendment only if the City lacked a reasonable basis for its grounds that the ordinance would protect children from harm.¹²⁶ The district court found a reasonable basis derived from empirical studies by psychologists, which documented a link between playing violent video games and aggressive attitudes and behavior in children, along with other samples of extensive literature demonstrating that violence in the media evokes aggressive feelings.¹²⁷ The court ruled in favor of the City and an appeal ensued.¹²⁸ Thereafter, the Seventh Circuit reversed the district

game manufacturers' First Amendment rights occurred. *See id.* While there might have been a claim for the children's First Amendment rights also, the court did not address it. *See id.*

122. *See id.* Though the ordinance was enacted in 2000, it had not yet gone into effect when the plaintiffs filed their complaint. *See City of Indianapolis and Marion County, Ind., General Ordinance 72-2000* (July 10, 2000). The ordinance applied only to establishments where there were five or more video games in one place. *See Kendrick*, 244 F.3d at 573. In addition, it required appropriate warning signs and that the restricted machines be separated by a partition from the other machines in the area. *See id.*

123. *Am. Amusement Mach. Ass'n v. Kendrick*, 115 F. Supp. 2d 943, 946 (S.D. Ind. 2000), *rev'd*, 244 F.3d 572 (7th Cir. 2001). The ordinance's definition of video games that are "harmful to minors" also included those that appeal to "minors' prurient interest in sex," and that contain "strong sexual content." *See id.* (quoting *City of Indianapolis and Marion County, Ind., General Ordinance 72-2000* (July 10, 2000)). The ordinance further defined "graphic violence" as "an amusement machine's visual depiction or representation of realistic serious injury to a human or human-like being where such serious injury includes amputation, decapitation, dismemberment, bloodshed, mutilation, maiming or disfigurement." *Id.* Because the plaintiffs in this case did not manufacture video games with sexual content, the only issue was the restriction on violent content. *See Kendrick*, 244 F.3d at 573.

124. *See Kendrick*, 244 F.3d at 573 (explaining plaintiffs were seeking to enjoin, as violation of freedom of expression, enforcement of ordinance that would limit minors' access to video games depicting graphic violence).

125. *See id.* at 573 (detailing plaintiffs' claim).

126. *See id.* at 574 (outlining district court's analysis).

127. *See id.* (explaining district court's finding with regard to City's evidence).

128. *See id.* (noting plaintiffs' argument on appeal was merely ordinance's illegality).

court's ruling due to the "entirely conjectural nature of the [ordinance's] benefits" to the City.¹²⁹ The court concluded that denying the injunction would impose more harm to the plaintiffs than the harm a preliminary injunction would cause to the City.¹³⁰

IV. ANALYSIS

A. Basis for Granting Injunction

The Seventh Circuit in *Kendrick* explained its holding on four grounds.¹³¹ First, the court stated that violence is not a category of speech excludable from First Amendment protection.¹³² It claimed that the ordinance attempted to equate violence with sex to invoke the obscenity exception.¹³³ Conversely, the court distinguished violence from obscenity by indicating the discrepancy in the concerns behind both.¹³⁴ It remarked "[t]he main worry about obscenity, the main reason for its proscription, is not that it is harmful, which is the worry behind the Indianapolis ordinance, but that it is offensive."¹³⁵ The court inferred that the courts that have upheld regulations of obscenity did not intend for the obscenity exception to encompass violence because they were safeguarding against an entirely different effect.¹³⁶

Second, the court claimed that violence should not be a separate exclusion from First Amendment protection because it would be "deforming" to shield minors from depictions of violence.¹³⁷

129. See *Kendrick*, 244 F.3d at 580 (inferring plaintiffs would stand good chance to win if City chose to continue fight).

130. See *id.* ("[Plaintiffs] will suffer irreparable harm if the ordinance is permitted to go into effect, because compliance with it will impose costs on them of altering their facilities and will also cause them to lose revenue.").

131. See *id.* at 574-80 (noting although more narrowly drawn statute might survive constitutional challenge, that was not issue court needed to decide in instant case).

132. See *id.* at 574 (stating violence has not been qualified yet as expressive form that can be regulated on basis of content).

133. See *id.* ("[T]he City asks us to squeeze the provision on violence into a familiar legal pigeonhole, that of obscenity [This] position is [not] compelling [however]. Violence and obscenity are distinct categories of objectionable depiction").

134. See *Kendrick*, 244 F.3d at 574-75 ("We shall discover some possible intersections between the concerns that animate obscenity laws and the concerns that animate the Indianapolis ordinance . . . , but in general the concerns are different.").

135. *Id.* at 574 (differentiating between obscenity and violence).

136. See *id.* (noting ordinance does not fall under obscenity exception because offensiveness was not basis of ordinance restricting violent content).

137. See *id.* at 577-78 (implying children learn survival skills through exposure to violence).

The court reasoned that barring minors' exposure to realistic images of violence would "leave them unequipped to cope with the world as we know it."¹³⁸ This reasoning derived from the court's belief that a restriction on violent video games translates into a ban on violent imagery altogether, including some classic works of art, literature, and movies.¹³⁹ The court raised and quickly dismissed the distinction that playing a violent video game is more interactive and thus potentially more harmful than reading a classic novel with depictions of violence, such as *War and Peace*, or even a classic fairy tale.¹⁴⁰ It reasoned that such books are equally interactive because "[l]iterature, when it is successful draws the reader into the story, makes him identify with the characters, invites him to judge them and quarrel with them, to experience their joys and sufferings as the reader's own."¹⁴¹ Therefore, the court found no substantive difference between this ordinance's regulation of violent video games and a ban on art, literature, or movies, in which the depictions of violence are important to a child's education and understanding of human conflict.¹⁴²

Third, the court held that the City presented no evidence that violent video games actually cause children to act violently.¹⁴³ It stated that "the [invalidity of] the Indianapolis ordinance could be overcome by social scientific evidence, but it has not been."¹⁴⁴ This is because the psychology studies on which the City relied demonstrated only that playing violent video games causes children to be more aggressive in their behavior and attitudes.¹⁴⁵ Accordingly, the court stated that the studies "are not evidence that violent video

138. *Id.* (recognizing value in children's learning violence).

139. *See Kendrick*, 244 F.3d at 577-78. The court listed Tolstoy's *War and Peace*, Homer's *The Odyssey*, Dante's *The Divine Comedy*, Mary Shelly's *Frankenstein*, Bram Stoker's *Dracula*, works of Edgar Allan Poe, and classic fairy tales of Grimm, Andersen, and Perrault as comparable to video games in their depictions of violence. *See id.* at 577.

140. *See id.* (illustrating violence in "*War and Peace* with its graphic descriptions of execution by firing squad, death in childbirth, and death from war wounds").

141. *Id.*

142. *See id.* ("People are unlikely to become well-functioning, independent-minded adults and responsible citizens if they are raised in an intellectual bubble.").

143. *See id.* at 578-79 (noting studies presented do not show that video games cause violent acts, as opposed to merely making players feel aggressive).

144. *Kendrick*, 244 F.3d at 579.

145. *See id.* at 574. The studies were reported in Craig A. Anderson & Karen E. Dill, *Personality Processes and Individual Differences - Video Games and Aggressive Thoughts, Feelings, and Behavior in the Laboratory and in Life*, 78 J. PERSONALITY & SOC. PSYCHOL. 772 (2000). *See id.* at 578.

games are any more harmful to the consumer or to the public safety than violent movies or other violent, but passive, entertainments.”¹⁴⁶ The court presumed that the City was attempting to experiment with regulating violence, and had chosen video games first before proceeding to movies.¹⁴⁷ The court asserted, however, that “[v]iolent video games played in public places are a tiny fraction of the media violence to which modern American children are exposed.”¹⁴⁸ Therefore, it questioned why the City believed it could isolate video games played in public places, when no such power to regulate existed for other sources of violence in the media, such as in movies.¹⁴⁹

Finally, the court stated that the plaintiffs’ video games contained cartoon characters, thus posing no real threat of violence.¹⁵⁰ The court reasoned that “[n]o one would mistake [the images] for photographs of real people.”¹⁵¹ The court suggested that the ordinance might have been valid if it had specified that it applied only to games that “used actors and simulated real death and mutilation convincingly[.]”¹⁵² Because the ordinance did not do so, but instead applied to the most fantastical images of violence, the court concluded that it was invalid.¹⁵³

Based on the four premises above, the court found the Indianapolis ordinance to be an unconstitutional infringement on speech.¹⁵⁴ The court ultimately reasoned, “given the entirely conjectural nature of the benefits of the ordinance to the people of Indianapolis, the harm of a preliminary injunction to the City must be reckoned slight, and outweighed by the harm that denying the injunction would impose on the plaintiffs.”¹⁵⁵ The court believed that the ordinance was not worth the cost to the plaintiffs of effect-

146. *Id.* at 579.

147. *See id.* (“We can imagine the City’s arguing that it would like to ban violent movies too, but that either this is infeasible or the City has to start somewhere and should not be discouraged from experimenting.”).

148. *Id.* at 579.

149. *See Kendrick*, 244 F.3d at 579 (asserting violent video games are no more violent than what is currently available to children on television and in movies).

150. *See id.* The court distinguished the facts of this case from those in *Ginsberg* by pointing out that the nude pictures distributed in magazines were of real people, while the images in video games are mere “fantasy mayhem.” *See id.*

151. *Id.*

152. *Id.* at 579-80.

153. *See id.* (claiming if ordinance had been more narrowly drawn, it may have survived constitutional challenge).

154. *See Kendrick*, 244 F.3d at 580. For a discussion of the *Kendrick* court’s analysis, see *supra* notes 131-53, *infra* notes 155-57 and accompanying text.

155. *Kendrick*, 244 F.3d at 580.

ating it because there was no scientific proof of benefits.¹⁵⁶ Therefore, the court struck down the ordinance.¹⁵⁷

B. How the Seventh Circuit Erred

The court's first argument that violence is not obscenity is proper.¹⁵⁸ Its remaining grounds for striking down the Indianapolis ordinance are problematic however.¹⁵⁹ The court's second argument, that the ordinance is comparable to bans on classic works of art, literature, and film, is untenable.¹⁶⁰ The critical difference is that violent arcade games are not a source of education, expression, or communication of ideas.¹⁶¹ The court has held that to warrant First Amendment protection, the regulated material must transmit a particularized message or have artistic or educational significance.¹⁶² Such content is not evident in video games as it is in clas-

156. *See id.* The court emphasized the costs to the plaintiffs if required to alter their facilities and their potential loss of revenue. *See id.*

157. *See id.* (granting plaintiffs preliminary injunction).

158. *See* Video Software Dealers Ass'n v. Webster, 968 F.2d 684, 688 (8th Cir. 1992) ("Material that contains violence but not depictions or descriptions of sexual conduct cannot be obscene. Thus videos depicting only violence do not fall within the legal definition of obscenity for either minors or adults.").

159. For a discussion of how the court's analysis is unsound, see *infra* notes 160-223 and accompanying text.

160. For a discussion on how video games are effectively different from other media, see *infra* notes 161-63, 165-70 and accompanying text.

161. *See* Interactive Digital Software Ass'n v. St. Louis County, 200 F. Supp. 2d 1126, 1134-35 (E.D. Mo. 2002) (concluding "video games have more in common with [non-expressive] board games and sports than they do with motion pictures" and are thus unprotected by First Amendment); Am.'s Best Family Showplace Corp. v. City of New York, Dep't of Bldgs, 536 F. Supp. 170, 173-74 (E.D.N.Y. 1982) ("[M]otion pictures are a significant medium for the communication of ideas. . . . [Alternatively,] video games are [in no way] meant to inform. Rather, a video game, like a pinball game, a game of chess, or a game of baseball, is pure entertainment with no informational element."); Caswell v. Licensing Comm'n, 444 N.E.2d 922, 927 (Mass. 1983) ("[A]ny communication or expression of ideas that occurs during the playing of a video game is purely inconsequential. . . . [V]ideo games are more technologically advanced games than pinball or chess. That technological advancement alone, however, does not impart First Amendment status to what is an otherwise unprotected game."); *see also* Miller v. Civil City of South Bend, 904 F.2d 1081, 1098-99 (7th Cir. 1990) (*en banc*) (Posner, J., concurring) (suggesting video games fall in "gray area" and that government has greater scope for regulation in this area, which may be outside boundaries of First Amendment), *rev'd sub nom.* Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991).

162. *See* Spence v. Washington, 418 U.S. 405, 409-10 (1974) (rejecting notion that all conduct intended to express idea can be labeled speech, and holding that defendant's act of displaying U.S. flag with peace symbol in apartment window warranted First Amendment protection because flags are historically symbolic and there was intent to convey particularized message that would be understood); Paris Adult Theatre I v. Slaton, 413 U.S. 49, 67 (1973) ("Where communication of ideas . . . is not involved . . . [the First Amendment] does not bar the State from acting to protect legitimate state interests."); Rothner v. City of Chicago, 929 F.2d 297, 303

sis novels, which are distributed to children in schools for educational purposes, or in movies, which may be intended to inform or to depict art.¹⁶³ In particular, novels are so vastly different from video games that the analogy fails.¹⁶⁴ The images of violence in novels are created only in the reader's imagination, not on a screen for impressionable eyes to see.¹⁶⁵ The studies with which the government was concerned were those that demonstrate a link between children's *seeing* an act and subsequently acting it out.¹⁶⁶ There are no referenced studies showing that *reading* about violence incites children to commit violent acts.¹⁶⁷

The court's flawed analogizing of video games with movies and literature also dismisses the obvious distinction that video games are entirely interactive.¹⁶⁸ Such interaction requires that players be active participants in the violence.¹⁶⁹ Therefore, the video game is

(7th Cir. 1991) (inferring there must be significant artistic or informative message for First Amendment protection); *Malden Amusement Co. v. City of Malden*, 582 F. Supp. 297, 299 (D. Mass. 1983) (finding no constitutional protection for playing of video games because no advancement of beliefs or ideas); *Am.'s Best*, 536 F. Supp. at 173 ("[B]efore entertainment is accorded First Amendment protection there must be some element of information or some idea being communicated. That idea is completely lacking [in video games]." (citing *S.E. Promotions Ltd. v. Conrad*, 420 U.S. 546, 556-58 (1975))); *see also* Wald, *supra* note 89, at 407 (1994) (suggesting video games lack information or artistic merit and thus fall outside First Amendment).

163. *See Am.'s Best*, 536 F. Supp. at 174 ("That some of these games 'talk' to the participant, play music, or have written instructions does not provide the missing element of 'information' [present in protected fiction and film.]").

164. For a discussion of how video games are effectively different from other entertainment forms, *see supra* notes 161-63, *infra* notes 165-70 and accompanying text.

165. For a description of the violent content in some modern video games, *see supra* notes 1-16 and accompanying text.

166. *See Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572, 574 (7th Cir. 2001). For a discussion of the studies presented in *Kendrick*, *see supra* notes 127, 143-46 and accompanying text.

167. *See Kendrick*, 244 F.3d at 574 (discussing violent literature, but failing to note any examples of increased violence in children as result of reading).

168. *See Holleman, supra* note 18, at EV3. The author explained: [V]iolent video games may be more dangerous than violent films or music for several reasons. First, they force the player to identify with the aggressor, the character doing the killing. . . . And it is aggressive behavior (kills, for example) that gets you [rewards]. . . . Second, the player is not a spectator but a participant. . . . Third, . . . video-game playing may be clinically addictive.

Id.; *see also* Stephen McGinty, *Mr. Movies Faces the Final Act*, THE SCOTSMAN, Aug. 9, 2001, at 6 ("We're dealing with vastly disparate art forms. The video game is interactive. Movies, music, television broadcasts are not."), *available at* 2001 WL 26026672.

169. *See Holleman, supra* note 18, at EV3 (noting dangers of child player being participant in violent activity in video games); McGinty, *supra* note 168, at 6 (discussing same).

a much more dangerous medium by which to present violence to children than television, film, art, or literature because video games require a certain level of violent activity to win, such as shooting, punching, stabbing, or killing, all at the push of a button or tweak of a joystick.¹⁷⁰

In any event, the plaintiffs in *Kendrick* failed to meet their burden of proving how their video games were intended to inform, teach, or contain a particular opinion, belief, or message.¹⁷¹ The district court in *Interactive Digital Software* stated, "it is the obligation of the person desiring to engage in assertedly expressive conduct to demonstrate that the First Amendment even applies."¹⁷² Consequently, without proof as to the expressive or educational content of the plaintiffs' video games, and because courts have characterized video games as non-expressive entertainment, the First Amendment does not apply.¹⁷³ It follows that the court did not need to apply the *O'Brien* test at all, but should have applied the less strict standard used in *Ginsberg* and *Paris* instead.¹⁷⁴

Accordingly, the court's third argument mistakenly asserts that studies showing a link between violent video games and violent tendencies are insufficient to support a substantial interest.¹⁷⁵ The court found the government's studies insufficient because they showed only that violent video games caused children to feel more aggressive, but not necessarily to act violently.¹⁷⁶ This was improper, however, because the Court in *Paris*, following *Ginsberg*, re-

170. For a discussion of how violent video games are more dangerous to children than other entertainment forms due to required level of interaction, see *supra* notes 168-69 and accompanying text.

171. See *Interactive Digital Software Ass'n v. County of St. Louis*, 200 F. Supp. 2d 1126, 1135 (E.D. Mo. 2002) ("[P]laintiffs failed to meet their burden of showing that video games are a protected form of speech under the First Amendment."). See generally *Kendrick*, 244 F.3d at 572-80 (failing to state how video games inform, teach, or communicate message).

172. 200 F. Supp. 2d at 1132 (discussing plaintiff's burden of proving First Amendment protection because "there is no presumption that all conduct is expressive").

173. For a discussion of courts' analyses of video games as unprotected by the First Amendment, see *supra* notes 92-95, 161-70 and accompanying text.

174. See *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 58-61 (1973) (following *Ginsberg's* rejection of heightened scrutiny); *Ginsberg v. New York*, 390 U.S. 629, 641-43 (1968) (rejecting heightened scrutiny where no First Amendment protection exists, and applying less strict standard). For a list of the *O'Brien* factors, see *supra* note 64 and accompanying text.

175. See *Ginsberg*, 390 U.S. at 641-43 (requiring finding only that regulation was not irrational means of furthering interest). But see *Kendrick*, 244 F.3d at 578-79 (belying *Ginsberg* by applying stricter standard of proof).

176. See *Kendrick*, 244 F.3d at 578-79 (analyzing empirical studies presented by government).

quired only a showing of "at least an arguable correlation between obscene material and crime."¹⁷⁷ The Court continued that "[n]othing in the Constitution prohibits a State from reaching . . . a conclusion [as to key relationships of human existence] and acting on it legislatively simply because there is no conclusive evidence or empirical data."¹⁷⁸ The City satisfied this standard by demonstrating what the *Paris* Court labeled "an arguable correlation" through its presentation of two empirical studies showing a connection between violent video games and violent tendencies.¹⁷⁹

The *Ginsberg* Court also held that scientific evidence is unnecessary to prove that an ordinance is rationally related to a substantial interest.¹⁸⁰ If the government provides a study to show a link between the substantial interest and the ordinance, it need not be entirely conclusive.¹⁸¹ The Court relied on "the growing consensus of commentators that while [the studies presented] all agree that a causal link has not been demonstrated, they are equally agreed that a causal link has not been disproved either."¹⁸² The Court concluded that because it was impossible to disprove a causative link, it "[could not] say that [the regulation had] no rational relation to the objective of safeguarding [minors] from harm."¹⁸³ This inability to find an *irrational* relationship led the Court to uphold the regulation.¹⁸⁴

177. See *Paris*, 413 U.S. at 58-61 ("Although there is no conclusive proof of a connection between antisocial behavior and obscene material, the legislature of Georgia could quite reasonably determine that such a connection does or *might* exist." (emphasis added)).

178. *Id.* at 63.

179. See *id.* at 58; see also *Kendrick*, 244 F.3d at 574. For a discussion of the studies presented in *Kendrick*, see *supra* notes 127, 143-46 and accompanying text.

180. See *Ginsberg*, 390 U.S. at 642-43. The *Ginsberg* Court noted that the legislature believed "that [the] material condemned . . . is a 'basic factor in impairing the ethical and moral development of our youth and a clear and present danger to the people of the state.'" *Id.* at 641 (quoting N.Y. PENAL LAW § 484-c (McKinney 1965)). The Court doubted how scientific the proof of causation was, but found it sufficient to validate the regulation. See *id.*; see also *Action for Children's Television v. FCC*, 58 F.3d 654, 661-62 (D.C. Cir. 1995). The *Action* court pronounced:

[T]he Supreme Court has never suggested that a scientific demonstration of psychological harm is required in order to establish the constitutionality of measures protecting minors from exposure to indecent speech. . . . Congress does not need the testimony of psychiatrists and social scientists in order to take note of the coarsening of impressionable minds

Id. (citing *Ginsberg*, 390 U.S. at 634, 641-43).

181. See *Ginsberg*, 390 U.S. at 642-43. For a discussion of the Court's required link between legislation and interest, see *supra* notes 56-59 and accompanying text.

182. *Ginsberg*, 390 U.S. at 642-43.

183. *Id.* (quoting C. Peter McGrath, *The Obscenity Cases: Grapes of Roth*, 1966 SUP. CT. REV. 7, 52 (1966)).

184. See *id.* (finding regulation valid because it satisfied Court's standard).

Accordingly, the validity of the ordinance as an appropriate means to the government's end requires merely that it be impossible to say that it is irrational to make such a connection between the regulated activity and the government's interest.¹⁸⁵ In the case of violent video games, it is not irrational to deduce that if such games evoke aggressive tendencies and behavior, children who continually play them will not be able to contain that aggression every time.¹⁸⁶ Therefore, as in *Ginsberg*, the ordinance is valid because it is impossible to conclude that aggressive tendencies and behavior are not rationally related to violence.¹⁸⁷

Moreover, the *Kendrick* court's inference that the City was experimenting with regulating violence and would next proceed to movies and possibly other forms of entertainment if the court validated the ordinance is implausible.¹⁸⁸ Restrictions on movies already exist through the Motion Picture Association of America ("MPAA") rating system, which, like the Indianapolis ordinance, only permits children's admittance to violent films if accompanied by an adult.¹⁸⁹ While the MPAA ratings are voluntary and not mandated by the government, there would be no need for the government to regulate an industry that is already self-regulated without one Supreme Court challenge.¹⁹⁰ Further, the MPAA's "R" rating for violent content (requiring the accompaniment of an adult for children under the age of seventeen) lends credence to the notion that the general public accepts that such material is harmful to children.¹⁹¹

185. For a discussion of this standard, see *supra* notes 175-84 and accompanying text.

186. See Condon, *supra* note 28, at 42 (suggesting increased aggression from video games can push children over edge and cause them to act violently); Holleman, *supra* note 18, at EV3 (citing social psychologist Karen E. Dill's testimony before Congress that sometimes children's increased aggressive tendencies cause them to act violently).

187. See *Ginsberg*, 390 U.S. at 642-43. For a discussion of this standard, see *supra* notes 175-84 and accompanying text.

188. For a discussion on how movies are regulated, see *infra* notes 189-91 and accompanying text.

189. See *Borger by Borger v. Bisciglia*, 888 F. Supp. 97, 98 (E.D. Wis. 1995) (explaining MPAA rating board looks to "theme, violence, language, nudity, sensuality, drug abuse, and other elements" to determine what rating to give film).

190. See Hamilton, *supra* note 91, at 205-06 ("[T]he MPAA is a voluntary industry organization . . . [whose rating system] has thus far been accepted by the courts . . .").

191. See Emily R. Caron, Comment, *Blood, Guts & the First Amendment: Regulating Violence in the Entertainment Media*, 11 KAN. J.L. & PUB. POL'Y 89, 93 (2001) (expounding MPAA established its rating system in 1930 in response to pressure from Roman Catholic Church to "clean up" content of popular movies believed to be

The court's fourth assertion that cartoon characters are not a threat because they are not real does not reflect actuality.¹⁹² After watching an episode of the animated television show *Beavis and Butthead*, which depicts teenaged boys who are obsessed with fire, a young boy emulated the characters' actions by igniting his trailer home, consequently killing his sister.¹⁹³ In addition, after the Columbine High School massacre in 1999, a home movie created by the two teenaged boys responsible for the bloodbath surfaced.¹⁹⁴ In it, one of the boys who avidly played the video game *Doom* declared his desire to use a sawed-off shotgun "straight out of *Doom*" at school.¹⁹⁵ The issue regarding copycat incidents of violence is not that the cartoon characters of *Beavis and Butthead* and *Doom* are believable, but that children are simply more impressionable than adults.¹⁹⁶ The Supreme Court has conceded such vulnerability by establishing a lower level of First Amendment protection for children.¹⁹⁷ Children are more prone to act on feelings evoked by

inappropriate for children's viewing, and subsequently, most theaters would not exhibit movies without MPAA seal).

192. For a discussion of how even cartoon characters can provoke copycat behavior in children, see *infra* notes 193-99 and accompanying text.

193. See David V. Scott, Comment, *The V-Chip Debate: Blocking Television Sex, Violence, and the First Amendment*, 16 LOY. L.A. ENT. L.J. 741, 742 (1996) (demonstrating children's exposure to television violence leads to copycat incidents of violence); see also John Windhausen, *Congressional Interest in the Problem of Television and Violence*, 22 HOFSTRA L. REV. 783, 788 (1994) (noting evidence of need for Congress to regulate violence in media).

194. See *CBS News: 60 Minutes II* (CBS television broadcast, Apr. 17, 2001) (investigating shootings at Columbine by interviewing classmates of teenaged killers and others at scene), available at 2001 WL 7139609.

195. See *id.* (interviewing friend of teenaged killers who informed CBS reporter, "[i]n the video games that we played, the sawed off shotgun [from *Doom*] was their favorite weapon"); see also Hamilton, *supra* note 91, at 186 (noting violent video games have both parents and psychiatrists concerned). Psychiatrists label *Doom* as one of the most violent and dangerous role-playing games available to children because it "embodies a dangerous concept[:] in order to win, the player must kill all of the other characters in the game." *Id.*; see also Condon, *supra* note 28, at 42 ("While countless other factors are at work when teen-agers resort to violent outbursts, can we seriously suggest that the video game *Doom* played no role in the Columbine High School massacre in Littleton, Colo[rado]? Of course not.").

196. See *Action for Children's Television v. FCC*, 58 F.3d 654, 662 (D.C. Cir. 1995) (inferring persistent exposure to dangerous material inevitably coarsens impressionable minds of children); see also Condon, *supra* note 28, at 40 ("The FTC itself has called upon Hollywood to voluntarily stop targeting impressionable teenagers with violence-laced products.").

197. See *Ginsberg v. New York*, 390 U.S. 629, 638-39 n.6 (1968) ("The world of children is not strictly part of the adult realm of free expression. The factor of immaturity . . . impose[s] different rules.").

images to mimic what they see.¹⁹⁸ Because studies prove that violent imagery arouses certain feelings that provoke violence, regardless of whether the images are animated, there is danger to the child and the community.¹⁹⁹

Although courts have held that video games do not invoke First Amendment protection, even if they did, the Indianapolis ordinance would pass constitutional muster.²⁰⁰ This is because it withstands the *O'Brien* test.²⁰¹ First, substantial interests under the state police power propelled the ordinance.²⁰² The purpose of the ordinance was to "[protect] the well-being of minors, [protect] parents' authority to shield their minor children from influences that [are] inappropriate or offensive, and [reduce] juvenile crime."²⁰³ The Supreme Court has recognized that assisting parents in shielding their children from harm is within the constitutional police power of government because it is an important state interest.²⁰⁴ In addition, combating a potential source of juvenile violence protects the psychological well-being of the child and the overall safety of the

198. See Condon, *supra* note 28, at 40 (noting reasonable conclusion that exposure to media violence causes violence in children due to so many recent tragedies with children mimicking specific depictions of violence in movies, television, and radio).

199. See *id.* (asserting need to stop entertainment industry from targeting children with violence in media); Golab, *supra* note 25, at 8 ("[V]ideo games can desensitize children to violence. . . . [and] games like *Quake* and *Doom* don't teach kids how to deal with other people or how to solve problems. [They] just show[] them that even the good guys use violence as a means to an end."); see also Hamilton, *supra* note 91, at 186 (stating Australian government has brought video games under control of Australian national censorship system in noting that concern for harmful effects of violent video games on children is worldwide); Nechas & Foley, *supra* note 25, at 6 ("[V]iolent games aren't doing anyone any good."). Researchers believe that these games may influence children's behavior by teaching them aggressive solutions to their problems. See *id.*

200. For a discussion of how the Indianapolis ordinance withstands the *O'Brien* test, see *infra* notes 202-223 and accompanying text.

201. See *United States v. O'Brien*, 391 U.S. 367, 377 (1968). For a discussion of the *O'Brien* requirements, see *supra* notes 62-88 and accompanying text.

202. For a discussion of the state's police power, see *supra* notes 65-67 and accompanying text.

203. *Am. Amusement Mach. Ass'n v. Kendrick*, 115 F. Supp. 2d 943, 948 (S.D. Ind. 2000) (quoting City's interest in preamble to ordinance), *rev'd*, 244 F.3d 572 (7th Cir. 2001).

204. See *Ginsberg v. New York*, 390 U.S. 629, 639 (1968) ("[C]onstitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society."); *Action for Children's Television v. FCC*, 58 F.3d 654, 661 (D.C. Cir. 1995) (asserting government has compelling interest in promoting parental supervision of that to which children are exposed).

entire community.²⁰⁵ Therefore, both are valid exercises of the state's police power and substantial interests of government.²⁰⁶

To satisfy the second prong of the *O'Brien* test, the government must show that the regulated activity frustrates a substantial interest, and ultimately demonstrate that its regulation furthers the substantial interest.²⁰⁷ The City in *Kendrick* presented studies showing that violent video games cause children to behave aggressively.²⁰⁸ It is reasonable to conclude that aggressive behavior has the potential to result in violence, especially in children because they are not as capable as adults of channeling their aggression.²⁰⁹ It is also reasonable to conclude that violent video games at public arcades frustrate the government's interests in assisting parents to shield their children from harm and in counteracting juvenile crime.²¹⁰ The City did not have to show that violent video games cause a direct rise in violent crime.²¹¹ It only had to show that given the situation, the ordinance would accomplish the City's legitimate goal.²¹² For instance, in *O'Brien*, the Court did not rely on scientific evidence to show that the ordinance satisfied the government's substantial interest.²¹³ The Court logically concluded that prohibiting draft card

205. See *Winters v. New York*, 333 U.S. 507, 510 (1948) ("We recognize the importance of the exercise of a state's police power to minimize all incentives to crime, particularly in the field of . . . juvenile delinquency."); *Eclipse Enters., Inc. v. Gulotta*, 134 F.3d 63, 67 (2d Cir. 1997) ("There is no dispute that the [government] has a compelling interest in protecting the psychological well-being of minors and in combating juvenile crime."); *Action*, 58 F.3d at 663 ("[S]ociety has an interest not only in the health of its youth, but also in its quality.").

206. For a discussion of what qualifies as within the state's police power, see *supra* notes 65-67 and accompanying text.

207. See *United States v. O'Brien*, 391 U.S. 367, 382 (1968). For a discussion of the substantial interest requirement, see *supra* notes 68-75 and accompanying text.

208. See *Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572, 578 (7th Cir. 2001). For a discussion of the studies presented in *Kendrick*, see *supra* notes 127, 143-46 and accompanying text.

209. For a discussion of the impressionable minds of children and how their aggressive tendencies often evoke violent behavior, see *supra* notes 186, 193-99 and accompanying text.

210. See *Hamilton*, *supra* note 91, at 182 (indicating parents' fear that their children are harmed by playing violent video games while out of their control and supervision, and asserting danger of juvenile crime).

211. See *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 51-52 (1986) (suggesting no studies are necessary "so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses").

212. For a discussion of what the *O'Brien* test requires to show that a regulation accomplishes the government's legitimate goal, see *supra* notes 68-75 and accompanying text.

213. See *United States v. O'Brien*, 391 U.S. 367, 378-80 (1968) (requiring much less than scientific certainty to show regulation furthered substantial interest).

burning combats the concern for obstructions to army conscription.²¹⁴ Because conditioning children's access to violent video games on parental supervision furthers both substantial interests of assisting parents in shielding their children from harm and of preventing the potential for juvenile crime, the ordinance passed this second constraint.²¹⁵

Third, the governmental interest was content-neutral.²¹⁶ That is, it was unrelated to the suppression of free speech because the regulation was intended to prevent violence and assist parents with shielding their children, and not to suppress a particular message, opinion, or idea.²¹⁷ Therefore, the ordinance regulated the noncommunicative impact of the video games, not the video games themselves.²¹⁸

Finally, consistent with the fourth *O'Brien* prong, the restriction was no greater than essential to further the governmental interest.²¹⁹ The ordinance did not ban minors from playing certain video games; it simply conditioned their use by requiring the super-

214. See *City of Erie v. Pap's A.M.*, 529 U.S. 277, 298-99 (2000) (O'Connor, J., plurality opinion) ("The Court [in *O'Brien*] did not require evidence . . . documenting instances of draft card mutilation or the actual effect of such mutilation on the Government's asserted efficiency interests. But the Court permitted Congress to take official notice, as it were, that draft card destruction would jeopardize the [Selective Service] system.").

215. See Ronald C. Kramer, *Poverty, Inequality, and Youth Violence*, 567 ANNALS AM. ACAD. POL. & SOC. SCI. 123, 129-30 (2000) ("[L]ack of effective parental supervision has a strong relationship to delinquency."). The author explained:

The ability of adults to monitor and supervise, impose sanctions, shame, and otherwise keep young people in line through face-to-face interaction within important social institutions is an important variable in delinquency prevention. There is a considerable amount of criminological evidence that suggests that these informal mechanisms of social control, operating within families, schools, neighborhoods, workplaces, and social networks, play an important role in preventing youth crime and violence.

Id.

216. For a discussion of the requirement of content-neutrality, see *supra* notes 78-82 and accompanying text.

217. See *Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572, 573-74 (7th Cir. 2001) (noting legislative history of ordinance indicates that its purpose was to prevent violent video games from engendering child players to commit violent acts). The court explained the purpose of the ordinance by stating that "the City is . . . concerned with the welfare of the game-playing children . . . and . . . of their potential victims." *Id.* at 576.

218. See *O'Brien*, 391 U.S. at 376-78. For a discussion of the noncommunicative impact of speech, see *supra* notes 78-82 and accompanying text.

219. See *O'Brien*, 391 U.S. at 381-82. For a discussion of the least restrictive means requirement of the *O'Brien* test, see *supra* notes 83-88 and accompanying text.

vision of a parent or other custodian.²²⁰ It left open alternative means of the manufacturers' expression because they could still display their violent games to children accompanied by an adult, and to adults at all times.²²¹ Further, children could play any other type of video game without the accompaniment of a parent or custodian, as long as its violence did not rise to the qualification of depicting "realistic serious injury to a human or human-like being where such serious injury includes amputation, decapitation, dismemberment, bloodshed, mutilation, maiming or disfiguration."²²² Because the City appropriately limited its scope to children and to the least restrictive means necessary, the ordinance was narrowly tailored to serve the City's substantial interests.²²³

V. IMPACT

Violent video games have become a prevalent form of entertainment in children's lives.²²⁴ In light of their documented harmful effects on children, it is crucial for the Supreme Court to qualify them as unprotected by the First Amendment.²²⁵ The Supreme Court has created exception for obscenity as a result of concern for protecting children from exposure to immoral sexual imagery, which has the potential to cause harm.²²⁶ Justice Stevens, commenting on sexually explicit material, explained:

[S]ociety's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammelled political debate that inspired Voltaire's immortal comment. . . . [F]ew of us would march our sons and daughters off to war to preserve the

220. See *Kendrick*, 244 F.3d at 573 (explaining parameters of ordinance and providing that it only applied to children unaccompanied by parent, guardian, or other custodian).

221. For a description of the ordinance, see *supra* notes 122-23 and accompanying text.

222. *Am. Amusement Mach. Ass'n v. Kendrick*, 115 F. Supp. 2d 943, 946 (S.D. Ind. 2000), *rev'd*, 244 F.3d 572 (7th Cir. 2001). For a description of the ordinance, see *supra* notes 122-23 and accompanying text.

223. See *United States v. O'Brien*, 391 U.S. 367, 381-82 (1968). For an explanation of the "narrowly tailored" requirement, see *supra* notes 83-88 and accompanying text.

224. See Hamilton, *supra* note 91, at 185 (estimating that *Doom* had reached over one million people worldwide in 1995).

225. For a discussion of the harm violent video games cause to children, see *supra* notes 18-28, 194-99 and accompanying text.

226. For a discussion of obscenity, see *supra* notes 51-59 and accompanying text.

citizen's right to see "Specified Sexual Activities" exhibited in the theaters of our choice.²²⁷

The same can be said of violence because violence is at least as harmful to children's development and society's general well-being as graphic depictions of sex.²²⁸ The International Committee of the Red Cross stated in its report on the impact of violent video games, "[t]o deny the link between visual violent media and violence in our society is truly like denying that tobacco causes cancer."²²⁹ Then why is it so difficult for the Court to treat violence like obscenity? The answer is unfathomable, especially when children's minds are so malleable that they emulate what they see.²³⁰ The concern for preventing violence is especially critical today when murder and mayhem are rampant, and depictions of violence are readily accessible to the impressionable minds of children.²³¹ Regulation of a documented source of such violent tendencies should reflect this concern.

Moreover, the Court has sanctioned governmental regulations of television and film to protect children.²³² In comparison to those modes of communication, video games are pure *entertainment*, substantially deficient in communicative value, and thus not

227. *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 70 (1976) (Stevens, J., plurality opinion) (upholding zoning restriction requiring at least 1000 feet in between adult movie theaters and other adult establishments).

228. *See Am. Amusement Mach. Ass'n v. Kendrick*, 115 F. Supp. 2d 943, 981 (S.D. Ind. 2000), *rev'd*, 244 F.3d 572 (7th Cir. 2001). For a synopsis of the court's reasoning, see *infra* note 236 and accompanying text.

229. Juliet Dee, *Basketball Diaries, Natural Born Killers and School Shootings: Should There Be Limits on Speech Which Triggers Copycat Violence?*, 77 DENV. U. L. REV. 713, 734 (2000) (quoting Robin Coupland, *Humans and Weapons*, International Committee of the Red Cross, Internal Doc. (Feb. 10, 2000)).

230. For a discussion of copycat incidents of violence due to children's impressionability, see *supra* notes 193-99 and accompanying text.

231. *See* Curt Anderson, *FBI: Crime Up First Time in Decade*, ASSOCIATED PRESS, Oct. 28, 2002, available at 2002 WL 102132284. The FBI reported that in 2001, violent crimes rose in the United States for the first time in a decade. *See id.* Such crimes included murder, armed robbery, rape, and burglary. *See id.* The FBI report did not include the September 11th deaths at the World Trade Center, Pentagon, and Pennsylvania site because they were "different from the day-to-day crimes committed in this country." *Id.*; *see also* Hamilton, *supra* note 91, at 182 ("Parents are concerned that their children, playing . . . violent video games, may carry that violence into the real world where people do not often get up again after being shot, stabbed, or dismembered.").

232. For a discussion of First Amendment application to various modes of speech and exceptions for children, see *supra* notes 40-88 and accompanying text. For a discussion of the MPAA system of regulating children's admission to violent movies, see *supra* notes 188-91 and accompanying text.

speech.²³³ Video games are also more dangerous than television or film because they engage the player in violent action by requiring the child to pull the trigger, jab the sword, or throw the punch.²³⁴ If there is a concern about children purely *witnessing* harmful behavior on a television or movie screen, then there should be an even greater concern for children actively controlling it.²³⁵

A district court judge has asserted aptly:

It would be an odd conception of the First Amendment . . . that would allow a state to prevent a boy from purchasing a magazine containing pictures of topless women in provocative poses, . . . but give that same boy a constitutional right to train to become a sniper at the local arcade without his parent's permission.²³⁶

This remark rings true especially today when there is a multitude of psychological research revealing a link between violent video games and harm to children's moral and social development, including the manifestation of violent tendencies.²³⁷ Therefore, it is time for the Supreme Court to address whether children's access to violent arcade games can be regulated constitutionally.²³⁸ In doing so, it should find in the affirmative, concluding that the decision of *Kendrick* was improper and ultimately dismissive of a legitimate, growing concern in today's society. If it fails to reach this result, children will continue to intuit that violence is entertaining, rewarding, and accepted by adults, the consequences of which negate crucial efforts to protect children, minimize crime, and rid society of impending doom.²³⁹

Elizabeth A. Previte

233. For a discussion of how violent video games lack informational, educational, and artistic content, see *supra* notes 92-95, 161-63 and accompanying text.

234. For a discussion of how violent video games are more dangerous to children than other entertainment forms due to the required level of interaction, see *supra* notes 168-70 and accompanying text.

235. See *Am. Amusement Mach. Ass'n v. Kendrick*, 115 F. Supp. 2d 943, 981 (S.D. Ind. 2000), *rev'd*, 244 F.3d 572 (7th Cir. 2001). For a synopsis of the court's reasoning, see *infra* note 236 and accompanying text.

236. *Am. Amusement*, 115 F. Supp. 2d at 981 (validating ordinance restricting children's access to violent video games).

237. For a discussion of psychologists' theories of harm to children from violent video games, see *supra* notes 18-28 and accompanying text.

238. For a discussion of how the Supreme Court has yet to address the issue, see *supra* notes 89-91, 96 and accompanying text.

239. For a discussion of the harm violent video games cause to children, see *supra* notes 18-28, 193-99 and accompanying text.